1998

Parley Baker and Dorene Lee v. Dale M. Barnes and Diana Jean Barnes : Reply Brief

Utah Court of Appeals

Jeff R. Thorne; Mann, Hadfield and Thorne; Attorneys for Appellees.
Scott L. Wiggins; Arnold and Wiggins; Attorneys for Appellants.

IN THE UTAH COURT OF APPEALS DOCKET NO. 980032-CA

PARLEY BAKER and DORENE LEE, Plaintiffs,	)	Case No. 980032-CA
v.	)	
DALE M. BARNES and DIANA JEAN BARNES, Defendants.	)	PRIORITY NO. 15
	)	**ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT

Appeal from Findings of Fact and Conclusions of Law Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment and the Order of Dismissal with Prejudice of the First District Court of Utah, Box Elder County, the Honorable Clint S. Judkins presiding.

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DETERMINATIVE AUTHORITY

ARGUMENT

I. IN THE COURSE OF GRANTING SUMMARY JUDGMENT, THE TRIAL COURT NOT ONLY FAILED TO PROPERTY DETERMINE WHETHER THE REAL ESTATE PURCHASE CONTRACT WAS AN INTEGRATED CONTRACT BUT IT ERRED IN CONCLUDING THAT THE PROVISIONS OF CONTRACT ARE UNAMBIGUOUS.

In their Brief, Appellees argue that "because the contract was integrated, the trial court was required to construe the language of the contract from within the four-corners [sic] of the contract." *See* Brief of Appellees, p. 8. Appellees' argument, for the reasons set forth below, is based on both a misapplication of the facts of the instant case to legal principles governing the interpretation of contracts and an incomplete analysis of such legal principles.[1]

According to settled principles of contract law, "[o]nce a court determines that an agreement is integrated, parol evidence, although not admissible to vary or contradict the clear and unambiguous terms of the contract, is admissible to clarify ambiguous terms."[2] *Hall v.*

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[1]Because the "[i]nterpretation of a written contract is ordinarily a question of law, . . . [the appellate court] need not defer to the trial court's construction but will make its own independent interpretation of the contract terms." *Jones v. Hinkle*, 611 P.2d 733, 735 (Utah 1980).

[2]According to *Hall v. Process Instruments and Control, Inc.*, 890 P.2d 1024 (Utah 1995), "before considering the applicability of the parol evidence rule in a contract dispute, the court *must* first determine that the parties intended the writing to be an integration. To resolve this question of fact, *any* relevant evidence is admissible." *Id.* at 1026. (Emphasis added.) The trial court erred in the course of its threshold determination that the REPC was intended to be integrated agreement because it failed to consider "any relevant evidence" in the course of doing so.

Process Instruments and Control, Inc., 890 P.2d 1024, 1026-27 (Utah 1995) (citing *Colonial Leasing Co. v. Larsen Bros. Const.*, 731 P.2d 483, 487 (Utah 1986)). Therefore, application of the parol evidence rule involves two steps. "First, the court must determine whether the agreement is integrated. If the court finds the agreement is integrated, then parol evidence may be admitted only if the court makes a subsequent determination that the language of the agreement is ambiguous." *Id.* at 1027. Further, "a contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (citing *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983)). "Whether ambiguity exists in a contract is a question of law." *Id.*

Although the trial court, in Conclusion of Law No. 2 of its Conclusions of Law Granting Defendants' Motion for Summary Judgment, concluded that the Real Estate Purchase Contract (REPC) and addendums were intended to be an integrated agreement, it erred in its determination that the terms of the REPC were unambiguous. The provision in section 2(b) of the REPC, "at closing - within 90 Days" and the provision in section 24(e) of the REPC concerning a settlement deadline of "April 30 - 97" are ambiguous inasmuch as they are "capable of more than one reasonable interpretation." In fact, in the course of arguing that the foregoing terms are unambiguous,

Appellees essentially acknowledge the ambiguous nature of the provisions. When viewed, the aforementioned provisions concerning the closing date "may be understood to reach two or more plausible meanings." *Larson v. Overland Thrift & Loan*, 818 P.2d 1316, 1319 (Utah Ct. App. 1991), *cert. denied*, 832 P.2d 476 (Utah 1992). Consequently, parol evidence may be utilized to clarify the ambiguity presented by the provisions concerning the date of closing.[3]

The plethora of affidavit testimony presented by Mr. Doug Allred, the real estate agent who represented the parties in the subject transaction, Mr. Parley Baker, and Mr. Brad Mortensen of Hillam Title Company establishes that the Barnes, at the very least, knew and understood that Plaintiffs would close on the subject property within 90 days of signing of the REPC (R. 215-16, Affidavit of Doug Allred, ¶¶ 5-6, 9-10; *see also* R. 82, Affidavit of Parley Baker, ¶ 7; R. 149, Affidavit of Brad Mortensen, ¶ 7; R. 222, Real Estate Purchase Contract, ¶ 2.1(b), which is attached as Exhibit B to the Affidavit of Doug Allred). Moreover, Mr. Barnes, himself, acknowledged that the 90-day closing deadline by virtue of his

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[3]At page 12 and footnote 4 of the Brief of Appellees, Appellees, in support of their argument concerning ambiguity, argue that Appellant's argument "attempts to invalidate the Statute of Frauds . . . ." In the course of quoting the Statute of Frauds as set forth in Utah Code Ann. § 25-5-3, Appellees delete the critical language "for a longer period than one year", which goes to the very purpose of the Statute of Frauds. Moreover, the convoluted nature of Appellees' argument makes it unclear how the Statute of Frauds is relevant to the instant case inasmuch as there was a writing by virtue of the REPC subscribed to by and between the parties.

attempts to have the transaction closed after the April 30, 1997, target closing date but before the 90-day closing deadline set forth in the REPC (R. 215-17, Affidavit of Doug Allred, ¶¶ 5-6, 9-12; *see also* R. 82, Affidavit of Parley Baker, ¶ 7).

II. THE RECORD ESTABLISHES THAT MR. ALLRED, ACCORDING TO SETTLED PRINCIPLES OF AGENCY, HAD AUTHORITY TO ACT ON BEHALF OF THE BARNES BOTH IN TERMS OF ACTUAL AND APPARENT AUTHORITY.

The Appellees also argue that Mr. Doug Allred "had no authority to vary the terms and conditions of the REPC as a limited agent. *See* Brief of Appellees, p. 13. Again, Appellees' argument is premised upon an improper analysis of the law of agency.

We know from settled law that the key relationship between a real estate agent and a client is agency, and that the universal laws applying to principals and agents control their rights and responsibility. *Wardley Corp. v. Welsh*, 962 P.2d 86, 89 (Utah Ct. App. 1998). Moreover, "an agency relationship can arise only at the will and by the act of the principal." *Id.* (quoting 3 Am.Jur.2d *Agency* § 17 (1986)).

Contrary to Appellees' assertions, the record is replete with evidence that an agency relationship between the Barnes and Mr. Allred was created by both the will and act of the Barnes as principal. *See* Statement of Facts, ¶¶ 2-23, set forth in the Brief of Appellant. Notwithstanding the fact that the Barnes were

personally aware of the 90-day closing deadline, principles of agency dictate, as a matter of law, that they, as sellers, were charged with knowledge of such inasmuch as Mr. Allred, their agent, was more than aware of the 90-day closing deadline. *See Foster v. Blake Heights Corp.*, 530 P.2d 815, 817 (Utah 1974); *see also Utah State Univ. v. Sutro*, 646 P.2d 715, 722 (Utah 1982); *Barker v. Francis*, 741 P.2d 548, 551-52 (Utah Ct. App. 1987). Interestingly, the carefully crafted Affidavit of Dale M. Barnes reveals that Mr. Barnes does not deny, whatsoever, that Mr. Allred acted as the Barnes' agent in the course of negotiating the subject real property transaction (*See* R. 245-54, Affidavit of Dale M. Barnes). In fact, in paragraph 3 of his Affidavit, Mr. Barnes admits signing the Listing Agreement & Agency Disclosure (*Id.* at 245, ¶ 3). Moreover, Mr. Barnes, in his Affidavit, does not refute the allegations set forth in the Affidavit of Mr. Allred, the agent, and confirmed in the Affidavit of Mr. Baker, that Mr. Barnes had on numerous occasions inquired about closing the transaction after the target date of April 30, 1997, and before the 90-day closing deadline set forth in the REPC (*See id.*). In addition, the Affidavit of Brad Mortensen, Manager of Hillam Title Company in Brigham City, who is a disinterested party in the subject transaction, establishes that Mr. Barnes had anticipated closing the transaction well after the April 30, 1997, target date for closing but that he no longer needed to close on the property "inasmuch as he had found another source of funds" (R. 148-49, Affidavit of Brad

Mortensen, ¶ 7). This is consistent with the affidavit testimony of Doug Allred that in conversation with Mr. Barnes, Mr. Barnes had admitted selling the property to a third party for cash, and therefore, he did not intend to close (R. 217-18, Affidavit of Doug Allred, ¶¶ 13-15).

In addition to Mr. Allred's having actual authority to act on behalf of the Barnes by virtue of the listing agreement between the Barnes and Mr. Allred, the doctrine of apparent authority applies to the facts of the instant case. "'The doctrine of apparent authority has its roots in equitable estoppel.'" *Luddington v. Bodenvest Ltd.*, 855 P.2d 204, 209 (Utah 1993) (quoting *J.H. v. West Valley City*, 840 P.2d 115, 128 (Utah 1992) (Howe, Assoc. C.J., dissenting). "'[I]t is founded on the idea that where one of two persons must suffer from the wrong of a third the loss should fall on that one whose conduct created the circumstances which made the loss possible.'" *Id.* The following must be established for apparent authority to apply:

> (1) that the principal has manifested his [of her] consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his [or her] position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

3 Am.Jur.2d *Agency* § 80 (1986) (cited in *Luddington v. Bodenvest Ltd.*, 855 P.2d 204, 209 (Utah 1993)). The facts of this case as evinced by affidavit testimony and evidence presented to the trial court establish that apparent authority applies to the instant case.

CONCLUSION

Based on the foregoing as well as that previously submitted to the Court by way of the Brief of Appellant, Plaintiff respectfully asks that this Court reverse the trial court's Order granting Defendants' Motion for Summary Judgment, reverse the trial court's Order denying Plaintiffs' Motion for Summary Judgment, and remand the case for a determination and award of attorney fees incurred on appeal as well as entry of judgment consistent with the Court's opinion.

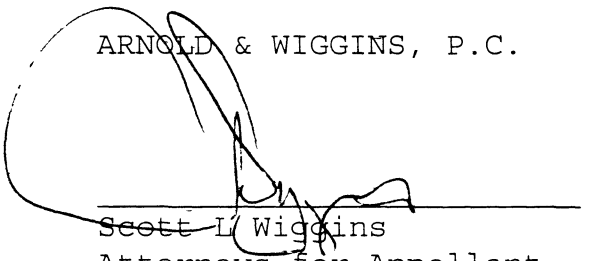
STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Plaintiff need not request oral argument inasmuch as oral argument is currently scheduled for March 29, 1999, at 9:30 a.m. In light of the significant issues raised in the instant appeal, counsel for Plaintiff requests that the method of disposition of the instant

appeal be by opinion designated by the Court "For Official Publication" for purposes of guidance in future cases.

RESPECTFULLY SUBMITTED this 17th day of March, 1999.

ARNOLD & WIGGINS, P.C.



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CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed (2) true and correct copies of the foregoing **Reply Brief of Appellant**, postage prepaid, to the following, on this 17th day of March, 1999:

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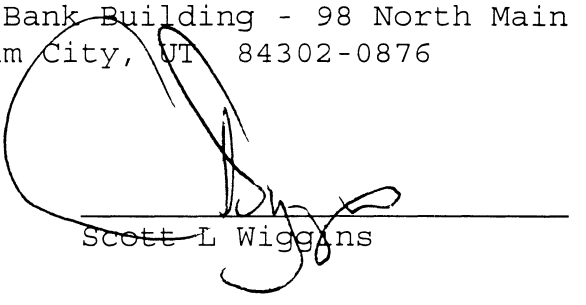

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ADDENDUM

No Addendum is necessary pursuant to Utah Rule of Appellate Procedure 24(a)(11).